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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE MARQUEZ,

Defendant and Appellant.

C059191

(Super. Ct. Nos.
CRF075054, CRF072417,
CRF074234, CRM074204,
CRF070009)

Defendant resolved four criminal cases by entering into a bargain in which he pled no contest to willful failure to appear (Pen. Code, § 1320.5), spousal battery (Pen. Code, § 243, subd. (e)(1)), and possession of methamphetamine (Health & Saf. Code, § 11377) in exchange for the dismissal of other charges. A fifth case went to trial, and the jury convicted defendant of possession for sale of methamphetamine and maintaining a place for drug usage or sales. (Health & Saf. Code, §§ 11378, 11366.)

The trial court sustained allegations that defendant was released from custody on his own recognizance when he committed these crimes. (Pen. Code, § 12022.1.) The trial court sentenced defendant to prison for seven years. Defendant timely filed this appeal.

Defendant contends no substantial evidence supports the charge of maintaining a place for drug usage or sales, the trial court violated his Sixth Amendment rights at sentencing, and the minute order and abstract do not properly reflect various monetary impositions. The Attorney General concedes one fine must be stricken from the abstract, and admits the minute order is partly "unclear." We will accept the concession and direct the trial court to prepare a new abstract and new minutes, but otherwise we shall affirm.

FACTS

The parties stipulated to the factual basis of the charges resolved by the plea bargain, in which defendant admitted battering his spouse in May 2007 (case No. CRM074204), failing to appear in June 2007 (case No. CRF072417), and possessing methamphetamine in July 2007 (case No. CRF074234). Case No. CRF070009 was dismissed pursuant to the plea bargain.

The following facts were presented at the jury trial conducted in case No. CRF075054.

In August 2007, West Sacramento Police Officer Alisha Slater contacted defendant during a traffic stop, and he had

over \$1,300 on his person. She put that money on the front seat of the car he was driving, and told him he could have it after she cited him for driving without a license. However, Candida Ruiz then arrived in another car, "jumped out" and tried to get into the car defendant had been driving, but could not because it was going to be towed. Defendant "jumped" into Ruiz's car, which was driven off by another person, leaving Ruiz at the scene *and leaving defendant's cash behind*. Slater "booked" the money "for safekeeping." Slater answered "Yes" when asked if she knew "whether or not Mr. Marquez, at some point, was able to retrieve that \$1300?" But she was not asked the logical follow-up question, that is, whether he *had* or *had not* retrieved the money, she only testified that she knew whether or not he had done so.

A week later, in September 2007, Slater saw defendant driving a car. She knew he did not have a driver's license. They made eye contact as their cars passed, and when she turned her car around to follow him, he "got onto the freeway and drove at a high rate of speed." Another officer radioed her to report that he saw what appeared to be the car defendant had been driving at the Granada Inn, and that Ruiz was in that car. Slater knew that Ruiz was defendant's girlfriend, reported this fact back and advised that defendant had probably fled on foot. Soon, two other officers found defendant near a dumpster. From

the time Slater passed defendant's car until he was captured, three to four minutes elapsed.

When Slater arrived at the Granada Inn, she learned Ruiz had rented a room, and she obtained a copy of the receipt, for room 247, for \$54.88, for that night. Ruiz gave consent to search that room. In a dresser drawer, Officer Slater found five baggies of methamphetamine, weighing .5, .6, .9, 3.8 and 7.1 grams, a digital scale of the kind she had seen used in drug sale cases, and about "30 unused tiny Ziploc baggies commonly used for packaging of narcotics." Under a nightstand she found a BB gun. From the top of that nightstand, Ruiz obtained and handed to Slater a used methamphetamine pipe. In the bathroom, Slater found a bandanna she thought was defendant's. When Slater searched defendant she found nearly \$687.97 on his person, in his pants' pocket.

After Slater read defendant his rights, he said he and Ruiz had been staying at the room "for the past two days," the drugs were "both his and [Ruiz's] and that they both use a lot of methamphetamine." He first said the money was for rent, and also said it was from a tax return. He said the scale was for measuring drugs to give to his friends. He said he was unemployed.

The car defendant had been driving the day of his arrest was registered to Ruiz.

A criminalist testified the samples weighed 6.79, 3.55, .40, .32 and .65 grams, without packaging.

California Highway Patrol Agent Vaughn Parsons, part of a narcotics task force, testified as a narcotics sales expert. Based on the evidence collected in this case, he opined the methamphetamine was possessed for sale. The quantity was too great for personal use, consisting of approximately 120 doses; scales are not needed by mere users; and mere users do not need quantities of unused packaging. It was not common for users to give drugs away, and in any event, giving drugs was legally the same as selling drugs. Drug dealers commonly possess replica firearms or BB guns "for protection, to keep from getting ripped off." It is common for drug dealers to carry large amounts of cash, even when they are otherwise unemployed.

Agent Parsons also opined that the room had been used for purposes of using and selling. Hotel rooms are commonly used by dealers, who may rent them for short periods of time, and the drugs and a used pipe were found in the room. Two of the packages were approximately the sizes of "an eight ball" and of "a quarter ounce," referring to the two larger packages, and the three smaller packages were consistent with common sale sizes. The total value of the drugs was about \$750.

Defendant's blood, drawn at the time of his arrest, had methamphetamine in it.

The jury convicted defendant as charged, finding him guilty of possession for sale of methamphetamine and maintaining a place for using or selling drugs, and the trial court found the on-bail enhancements true.

DISCUSSION

I.

Defendant contends no substantial evidence supports the verdict on the count charging him with maintaining a place for using or selling drugs. We disagree.

Defendant, in part, discusses the standards applicable to a motion to acquit, whereby the evidence is measured as of the close of the People's case. (See 5 Witkin & Epstein, Cal. Criminal Law (3rd ed. 2000) Criminal Trial, §§ 563-564.) After the People rested, the defense stated it would not introduce any evidence. Because no evidence was introduced in this case *except* during the People's case-in-chief, we need not separately analyze defendant's challenge to the denial of his motion to acquit, as it would be duplicative of our analysis of the sufficiency of the evidence.

"In reviewing a claim of insufficiency of the evidence, we review the record to determine whether it contains substantial evidence from which a reasonable trier of fact could conclude that the defendant was guilty beyond a reasonable doubt. [Citation.] The test is whether the trier of fact's conclusions are supported by substantial evidence, i.e., evidence that is

reasonable in nature, credible, and of solid value. [Citation.] We consider the evidence in a light most favorable to the judgment and draw reasonable inferences in support of the judgment." (*People v. McElroy* (2005) 126 Cal.App.4th 874, 881.)

The statute defining the offense of maintaining a place for drug use or sale provides in part as follows: "Every person who opens or maintains any place for the purpose of unlawfully selling, giving away, or using any controlled substance . . . shall be punished by imprisonment in the county jail for a period of not more than one year or the state prison." (Health & Saf. Code, § 11366.)

The evidence must show a continuity of operation: "[E]vidence of a single instance of drug use or sales at the house, without circumstances supporting a reasonable inference that the house was used for the prohibited purposes continuously or repetitively, does not suffice to sustain a conviction of the opening-or-maintaining offense." (*People v. Hawkins* (2004) 124 Cal.App.4th 675, 682 (*Hawkins*); see *People v. Shoals* (1992) 8 Cal.App.4th 475, 490.)

Accordingly, the jurors were instructed that they had to find defendant had the intent "to sell, give away, use, or allow others to use . . . methamphetamine, on a continuous or repeated basis at that place." In response to a jury question, the trial court elaborated on the pattern instruction, and emphasized that

"a single or isolated instance of the forbidden conduct does not suffice."

Defendant first contends that there is no evidence *he* maintained the room, because it was rented by Ruiz. The evidence and reasonable inferences show defendant and Ruiz were companions, defendant fled towards the motel when he was seen driving by Slater, and defendant admitted that he had stayed in that room for two days. The fact only Ruiz's name is on the room receipt does not defeat the rational inference that defendant was in joint control of the premises.

Defendant also contends that there was no evidence the room had been used for more than one day. Recognizing that defendant's own statements tend to show otherwise, he asserts the corpus delicti was not established, therefore his statements cannot be used to establish guilt.

The jury was instructed on the corpus delicti rule in part as follows: "The defendant may not be convicted of any crime based on his out-of-court statements alone. You may only rely on the defendant's out-of-court statements to convict him if you conclude that other evidence shows that the charged crime was committed. [¶] That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed. [¶] The identity of the person who committed the crime may be proved by the defendant's statements alone."

The rule requires proof of a crime, independent of a defendant's statements, "to ensure that one will not be falsely convicted, by his or her untested words alone, of a crime that never happened." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1169 (*Alvarez*).) "The independent proof may be circumstantial and need not be beyond a reasonable doubt, but is sufficient if it permits an inference of criminal conduct, even if a noncriminal explanation is also plausible. [Citations.] There is no requirement of independent evidence 'of every physical act constituting an element of an offense,' so long as there is some slight or prima facie showing of injury, loss, or harm by a criminal agency. [Citation.] In every case, once the necessary quantum of independent evidence is present, the defendant's extrajudicial statements may then be considered for their full value to strengthen the case on all issues." (*Id.* at p. 1171.)

In this case, sufficient independent evidence "permits an inference" (*Alvarez, supra*, 27 Cal.4th at p. 1171) that the charged crime was committed. The police found scales and packages of drugs, in amounts suitable for sales, as well as unused packaging, in the motel room. An expert testified the amount of drugs was too great for personal use, and mere users do not commonly possess scales and unused packaging. Defendant had nearly \$700 in his pants, and a BB gun was found in the room. The prior week, defendant also carried a great deal of cash, which he abandoned (at least temporarily) rather than wait

for a traffic ticket to be issued, an unusual action which supports the reasonable inference that that money was not lawfully acquired. The expert testified drug dealers often possess replica weapons and carry a lot of cash. Another officer testified hotel rooms are commonly used for drug sales. Defendant had methamphetamine in his blood, and a used pipe was present, showing past use. The large amount of drugs found, 120 doses worth about \$750, coupled with the scales and packaging material, tend to show the intent to use or sell or give drugs to others in the future. On this evidence "and in light of the low pertinent evidentiary standard," it could reasonably be inferred that "someone had a purpose of using the house continuously or repeatedly for selling, giving away, or using controlled substances." (*Hawkins, supra*, 124 Cal.App.4th at p. 681; see *Alvarez, supra*, 27 Cal.4th at p. 1171 [evidence satisfies corpus delicti rule "if it permits an inference of criminal conduct"].)

Finally, we reject defendant's contention that no substantial evidence shows any continuity of purpose of using the motel room to distribute drugs. Once the corpus delicti rule is satisfied, "the defendant's extrajudicial statements may then be considered for their full value to strengthen the case on all issues." (*Alvarez, supra*, 27 Cal.4th at p. 1171.) In this case, defendant admitted to an officer that he had been at the motel for two days. In the reply brief defendant suggests

that his statement "probably meant he stayed overnight." That is not the only rational inference that may be drawn from his statement. Further, defendant stated that he and Ruiz used lots of drugs, and that he used the scales to give drugs to his friends. Gifts of drugs are treated the same as sales, under the statute. (Health & Saf. Code, § 11366.) The evidence, taken as a whole, "sufficiently showed a purpose of ongoing use or sale to support the verdict when added to the other evidence described earlier." (*Hawkins, supra*, 124 Cal.App.4th at p. 683.)

We conclude substantial evidence supports defendant's conviction for maintaining a place for drug use or sales.

II.

Defendant contends the trial court violated his Sixth Amendment rights, as articulated in *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856] (*Cunningham*), and related cases, by basing its sentencing decisions on facts not found true by the jury. We disagree for two reasons.

First, sentencing in this case took place on June 16, 2007. This was after the effective date—March 30, 2007—of revisions to the Determinate Sentencing Law adopted in response to *Cunningham*. (Stats. 2007, ch. 3, § 2.) Under the new sentencing procedures, "(1) the middle term is no longer the presumptive term absent aggravating or mitigating facts found by the trial judge; and (2) a trial judge has the discretion to

impose an upper, middle or lower term based on reasons he or she states.” (*People v. Wilson* (2008) 164 Cal.App.4th 988, 992.)

Second, the trial court imposed the upper term of three years for possession for sale of methamphetamine, citing in aggravation the fact that defendant’s prior convictions “are numerous and increasing in seriousness, and that Mr. Marquez was on probation at the time of the commission of the offense.” The Sixth Amendment does not require that such factors be submitted to the jury for determination. (*People v. Towne* (2008) 44 Cal.4th 63, 70-71, 77-83; *People v. Black* (2007) 41 Cal.4th 799, 816-820.) Accordingly, defendant’s *Cunningham* challenge fails, regardless of the new sentencing statute.

III.

Defendant challenges a number of monetary impositions. With one exception we will reject his contentions.

A.

The abstract states defendant was ordered to pay “the 1202.44 P.C. fine of \$200.00 previously imposed now to be collected by [the prison authorities] in case(s) [CRF07-4234 and CRM07-4204.]” This is a probation revocation fine. (Pen. Code, § 1202.44.) The trial court did not order defendant to pay such a fine in case No. CRM074204. Defendant contends the abstract should not include this fine in case No. CRM074204 because it was not imposed by the trial court. The Attorney General

concedes the point. We accept the concession. (See *People v. Zackery* (2007) 147 Cal.App.4th 380, 388-389.)

Because the abstract must accurately reflect all aspects of the sentence (*People v. Delgado* (2008) 43 Cal.4th 1059, 1070), we will direct the trial court to prepare a new abstract deleting this fine.

Because this fine will be deleted, we need not address defendant's contention that it is too high.

B.

Defendant contends the trial court imposed "duplicate" fines in case No. CRF074234. We disagree.

The trial court imposed a \$200 restitution fine under Penal Code section 1202.4, subdivision (b) when defendant was granted probation. Although defendant contests the point, the trial court also imposed a probation revocation fine (Pen. Code, § 1202.44) at that time, "to become effective upon the revocation of probation[.]"

At sentencing, the trial court stated "Pursuant to Penal Code section 1202.4(B) [*sic*], Mr. Marquez is to pay a restitution fine of \$200.00 for each felony case, to be collected by [the prison authorities]. The previously ordered restitution fine[s] in [CR07-4204 and CR07-4234] remain in full force and effect and [are] now to be collected"

Defendant perceives an ambiguity, stating "the court was unclear if it intended to order a second restitution fine

pursuant to Penal Code section 1202.4, or if it intended to impose a probation revocation fine pursuant to Penal Code section 1202.44. Some clarification is necessary” He contends a “second restitution fine in case no. CR07-4234 is unauthorized and should be stricken.”

The abstract states that defendant must pay a \$200 restitution fine (Pen. Code, § 1202.4, subd. (b)) in each case. It also states the previously ordered probation revocation fine (Pen. Code, § 1202.44) of \$200 is now “to be collected” in case No. CRF074234.

At worst, the trial court was imprecise at sentencing. It is clear the trial court meant to impose a \$200 restitution fine in each case, and since defendant’s probation was revoked and he was going to prison, the trial court intended to make operative the \$200 probation revocation fine previously imposed in case No. CRF074234 that was ordered “to become effective upon the revocation of probation[.]” The abstract correctly reflects these two fines. There is no error or ambiguity in the abstract to correct.

C.

The minute order, as read by defendant, shows that drug lab and drug program fees were imposed in case No. CRF072417, a case which had never charged any drug offenses. He also contends *duplicative* lab and drug program fees were imposed in case Nos. CRF074234 and CRF072417.

The trial court imposed a \$50 lab fee (plus \$140 penalty assessment), citing Health and Safety Code section 11372.5, and a \$150 drug program fee (plus \$420 penalty assessment), citing Health and Safety Code section 11372.7. The trial court did not specify any particular case to assign these fees to. Although the abstract notes case Nos. CRF074234 and CRF075054 next to these fees, the abstract indicates a \$50 lab fee plus \$140 assessment, for a "total" of \$190, and a \$150 drug program fee plus \$420 assessment, for a "total" of \$570, exactly as ordered by the trial court.

Defendant concedes that the *abstract* does not indicate that duplicate fees were imposed, and that the trial court did not purport to impose duplicate fees at sentencing. However, he contends a notation in the minute order is ambiguous.

We have previously held that not only must the abstract be correct, the minutes of sentencing must be correct. (*People v. Zackery, supra*, 147 Cal.App.4th at p. 386.) In this case, the minute order contains a number of handwritten margin notes, some of which are perpendicular to other text and hard to decipher. Although it is not clear the minute order is *wrong*, we agree with defendant that the minute order is unclear about the drug and lab fees, and arguably on other points. Even the Attorney General describes the drug and lab fee portion of the minute order as a "cryptic note" which is "admittedly unclear." We

will direct the trial court to prepare clear minutes reflecting the defendant's sentence in each case.

DISPOSITION

The trial court is directed to prepare and forward to the Department of Corrections and Rehabilitation a new abstract of judgment deleting the probation revocation fine in case No. CRM074204, and to cause to be prepared legible sentencing minutes. In all other respects, the judgment is affirmed.

CANTIL-SAKAUYE, J.

We concur:

SIMS, Acting P. J.

NICHOLSON, J.